In the

UNITED STATES

COURT OF APPEALS

for the

NINTH CIRCUIT

No. 22331

NANCY JEWELL CROSS, for herself and for all persons like interested,

Plaintiff and Appellant,

v.

JOHN A. BRUNING, County Clerk of San Mateo County, and

FRANK M. JORDAN, Secretary of State of California,

Defendants and Appellees.

OPENING BRIEF AND MOTION FOR SUMMARY REVERSAL, APPROPRIATE COMPOSITION OF A THREE-JUDGE DISTRICT COURT, EXPEDITED HEARING, AND LEAVE TO FILE A PETITION FOR WRIT; PETITION FOR WRIT; AND MEMORANDUM OF POINTS AND AUTHORITIES

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S U B J E C T I N D E X

TABLE OF REFERENCES

Alphabetical

To the Honorable United States Court of Appeals:

In action of title foregoing filed October 4, 1967 as No. 47974 in the United States District Court for the Northern District of California, Nancy Jewell Cross herewith respectfully submits her Opening Brief on appeal noticed October 30, 1967 from the Order filed October 9, 1967 denying a three-judge District Court pursuant to 28 U.S.C. §2281 "for want of a substantial federal question", and moves this Court for summary reversal thereof, for appropriate composition of a three-judge District Court, for expedited hearing, and for leave to file a petition for a writ --with this paper following considered as the petition.

The appeal, motion, and petition are based on the Complaint, Order, and other papers of the Record from the United States District Court, this paper, and such further papers and evidence as plaintiff-appellant may file or otherwise submit to the Court before its final determination of the matters herein.

I. Statutory Provisions Believed to Sustain the Jurisdiction

Statutes believed to sustain the jurisdiction of the United States District Court are United States Code, Title 28, Sections 1331, 1343, 2201, 2202, 2281, 2284, and 2461; Title 42, Sections 1981, 1983, 1985, 1986, and 1988; and Title 18, Section 241. The statutes, and also United States Constitution provisions, invoked were before the United States District Court in the Complaint. Pages 1 - 2 of the Complaint and Record.

The Court of Appeals has jurisdiction of the appeal by United States Code, Title 28, Section 1291. It has writ jurisdiction in the action by 28 U.S.C. Section 1651.

Nancy Jewell Cross, an inhabitant, citizen, taxpayer, and duly qualified elector of the United States, California, and San Mateo County, brought this action for herself and all persons like interested, to maintain her and their rights of federal citizenship in the election of Representative to Congress from San Mateo County against conditions of candidacy, process, and selection therefor applied and threatened by Frank M. Jordan, Secretary of State of California, and John A. Bruning, County Clerk of San Mateo County, defendants herein, acting under color of general state law in conflict with United States Constitution Article I, Section 2, Clause 2, Article VI, Sections 2 and 3, and Amendments I, IX, XIII, and XIV.

Plaintiff seeks judicial decree enjoining the enforcement of California Elections Code Sections 7201, 7203, 6551, 6552, 6553, 6555, 6651.5, 6655, 6830, 6831, 6832, 6833, 11,503, 11,560, 11,563, 11,565, 12,041, 12,053, and 12,054, enjoining or setting aside and vacating nomination and election proceedings and results pursuant thereto since the filing of this action, declaring conditions of candidacy, process, and selection for Representative to Congress permissible under the United States Constitution to defendants, and granting associated relief.

Conditions of candidacy, nomination, and election for Representative to Congress from San Mateo County in addition to those of being a registered elector of California and San Mateo County (California Constitution, Article II, Section 1; California Government Code, Sections 274 and 275, and California Elections Code, Sections 20 and 100) and those of having attained the age of 25 years, of

having been a citizen of the United States 7 years, of being an inhabitant of the State where chosen, and of being bound by oath or affirmation to support the United States Constitution (U.S. Constitution, Article I, Section 2, Clause 2, and Article VI, Sections 2 and 3),

a. Vary conditions of candidacy, process, and selection among persons equally qualified for office and against the relative popularity of persons listed on the ballot with electors, according to whether a candidate or person desiring to be a candidate has chosen one of the two State Parties on her or his voter registration form, or not. Thus one person desiring to have his name on the ballot for the office of Representative to Congress was excluded because in 8 days for collecting signatures on a nominating petition he obtained only 405 instead of 500, whereas all the other persons taking out nominating papers were required to have only 40 signatures in the same period because they had specified "Democratic" or "Republican" on their voter registration forms! Likewise arbitrarily discriminating, the scheduled process requires any person not so registered as an elector to be first or second in popularity among electors in order to qualify for place on subsequent election ballot, but it assures a place on such subsequent ballot to a person of each State Party--the one of each such party polling the most votes, regardless of such persons' relative popularity with electors. Quite possibly candidates of greater relative popularity with electors will be denied listing on subsequent election ballot.

b. As a condition of obtaining nomination papers of actual value about 25¢ (this distinguished from filing them after collection of signatures, or from receiving a certificate of election or nomination

after an election), require payment of a percentage of the salary from the United States Treasury to a Representative to Congress. The amount is 1% of $30,000, or $300. The payment is nonrefundable. Thus the man who was denied a place on the ballot because he obtained only 405 signatures instead of 500 lost $300 he was required to pay to obtain the forms for his efforts. The $300 fee for nomination papers required to proceed toward the office of Representative to Congress prohibits the listing on the ballot and application for forms by persons qualified by the Article provisions of the United States Constitution heretofore cited and, contrary to the Amendments thereof cited,[1] highly discriminates against persons of present economic status and sex and races particularly lacking fair representation and effective legislative participation and voice for their concerns, and particularly needed in Congress for Congress's maximum competence to its legal jurisdiction and functions.

c. As pre- and post-conditions and punishments of candidacy as such, require oaths to statements of political character and information of lawful private affairs, associations, and relations. Failure to make the disclosures and political declarations under oath on official forms and file them by required times prevents issue of nomination papers for present and future elections, causes refusal of certificates of nomination and election for which a person has qualified by election results, and/or imposes criminal liability! These oath conditions provide means at the hand of the State for interminable harassments to intimidate political independence, and advocacy of ideas and support of candidates not already in office or favoring continuance of incumbencies. Not all persons qualified

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[1] And also to California Constitution, Article I, Section 24:
"No property qualification shall ever be required for any person to vote or hold office."

for Representative to Congress by the United States Constitution find these oaths consistent with loyalty thereto and personal integrity. These State-imposed conditions are prohibitive of their candidacy, occupation of the office, and contributions of character to Congress.

For correction of conditions a, b, and c foregoing, Nancy Jewell Cross duly and timely sought administrative remedies when call of election was imminent. The first response to letters she presented to County Clerk John A. Bruning and mailed to Governor Ronald Reagan on July 7, 1967 was press release from the Attorney General's office on September 29, 1967. Determing the inadequacy of the response to the matters raised, she as speedily as possible thereafter prepared and prior to the scheduled first day of issuing nomination papers filed the Complaint of this action and asked the Law and Motion Judge of the United States District Court for a restraining order. After a few minutes' consideration of the Complaint and papers for restraining order, and without permit of hearing to plaintiff, he refused the request.

The Clerk of the District Court on his own initiative from the request in the Complaint for a three-judge District Court independently on the same day, according to the Docket (Record, page 51), submitted the Complaint to the same judge for consideration of the request for a three-judge District Court. He without motion from or notice or hearing to plaintiff in the meantime on October 9, 1967 filed an Order denying a three-judge District Court pursuant to 28 U.S.C. §2281 "for want of a substantial federal question". (R., p.48.)

Over the filing of the suit John A. Bruning acting in concert and conspiracy with Frank M. Jordan issued and filed nomination papers under conditions and processes objected to by plaintiff and violating her and others' rights by the United States Constitution in its provisions aforesaid and has planned and is in process of conducting primary and special elections on November 14 and December 12, 1967 from candidacies truncated from what they would be in respect of the United States Constitution and with selection of survivors from one election to the next subordinating popularity of candidates with the electorate to State Parties' promotion.

For further statement and particulars of the facts, law invoked and involved, relief sought, form of Complaint, and proceedings, plaintiff adopts here as if fully set out, the Complaint and Record, at Record pages 1-46 and 1-51.

III. Specification of Errors

Appellant designates the following as errors by the District Court:

1. Refusal of restraining order--and thereby and thence of order to show cause and temporary injunction, and acceleration of action.
2. Denial of a three-judge District Court.
3. Denial of existence of a substantial federal question.
4. Denial of day in the District Court.

In addition to substantive error in the judicial acts and omissions relative to the papers presented in themselves, procedural error to the degree of denial of due process of law by the Fourteenth Amendment occurred in the District Court. The substantive result

might well have been different had the District Court accorded fair process.

IV. Relief Asked Of This Court and Need for Expedited Hearing

The Court will see from the foregoing that matters of public importance to be determined speedily are in active controversy here. If ultimate decree in the action concludes discrepancy between State statutes and election processes heretofore planned by defendants, results of the elections may be expected to be set aside and declared void to the extent that the elections and proceedings therefor are not timely enjoined. In expenditures of tax-collected dollars, in time and attention of electors in preparing for voting and attending the polls, and in outlays by candidates, substantial expenditures which may be futile can by speedy determination of this action be avoided and put into elections with conditions of candidacy, processing, and selection consistent with the United States Constitution to give the people of San Mateo County needed representation in Congress according to law.

Plaintiff asks this Court to reverse the Order in this action filed on October 9, 1967, to direct the convening of a three-judge District Court for the action, to include judges of both sexes on the panel and insofar as practicable vary each judge from each other by sex or race, to issue or direct the District Court to issue a restraining order and order to show cause why a temporary injunction should not issue, and to grant such other and further remedy and relief as this Court finds appropriate in the facts and circumstances.

Respectfully submitted,

Nancy Jewell Cross

MEMORANDUM OF POINTS AND AUTHORITIES

And Concise Argument of the Case

Reference is made to the foregoing Motion, Petition, and first part of Opening Brief, and to the Record as a whole and the Complaint--on pages 1-46, and Order--on page 48, in particular.

1. Court of Appeals Jurisdiction and Remedy

The Court of Appeals has jurisdiction of the appeal by 28 U.S.C. §1291. The Order filed October 9, 1967 is final because it disposes of the action in substance entirely. The denial of a three-judge District Court is on a ground which refutes any basis for federal court relief by the action. Without arguing the Order nothing possibly is left of plaintiff's action so far as the District Court is concerned. The Order decides the merits not just with respect to a three-judge District Court, but entirely for a District Court of any composition.

Idlewild Corporation v. Epstein (1962) 370 US 713.

Summary reversal on motion after appeal to this Court is supported in a case analogous:

Marshall v. California Department of Social Welfare (CA 9, August 18, 1967) No. 22053; U.S.D.Ct. N.D. Calif. No. 47401).

Should the Court of Appeals for any reason find remedy by writ more appropriate, its jurisdiction is by 28 U.S.C. §1651.

See Stratton v. St. Louis Railway (1930) 282 US 10 at 14-18. (Mandamus under a predecessor to the present 3-judge statute.)

2. Federal Supremacy and Preemption of Subject

Through Article VI, Section 2 and the Fourteenth Amendment, the United States Constitution is efficiently supreme on elections and political processes. The following cases illustrate this.

United States v. Manning (1963) 215 F Supp 272 at (1,2) on 277 and (15-18) on 287-288

Harper v. Virginia State Board of Elections (1966) 383 US 663

South Carolina v. Katzenbach (1966) 383 US 301

Harman v. Forssenius (1965) 380 US 528

Lucas v. 44th General Assembly of Colorado (1964) 377 US 713.

Ordinarily States conduct congressional elections. In these and other elections federal courts have jurisdiction to effect right process against state officers.

Munoz v. Amador (Texas 1964) 230 F Supp 591.

A federal district court should set aside a local election which it should have enjoined because of a deprivation of civil rights. Hamer v. Campbell (CA 5 1966) 358 F2d 215

The state statutes and process whose enforcement plaintiff seeks to enjoin and whose results she seeks to have vacated and set aside violate clear preemption in the United States Constitution in Article I, Section 2, Clause 2; Article VI, Sections 2 and 3, and Amendment XIV, Sections 2 and 3, on Representatives to Congress and their qualifications.

3. Invidious Classifications and Statutory Forfeitures

Governmentally fair-and-even-handed opportunity for participation in public offices is a right and attribute of citizenship in a democracy and republic. Systematic under-representation, and token representation, of persons by sex and race constituting a majority of the adult population, in elective and public policy-making offices evince the exercise of governmental power discriminatorily to promote a minority by sex and race at other people's

expense. Exhibits E, F, G, H, and I, at pages 27-30, of the Complaint and Record illustrate one-third of the adult population by sex and race to be economically and politically privileged far and above the rest. The other 2/3 has but 5% of the membership of Congress! In order to avoid not only direct but indirect invidious discrimination by sex, race, and wealth, and enable persons of different status and consequently different views to have effective voice for and redress of their grievances and make their unique contributions to national policies, statutes in constitutionally sensitive areas of political expression and representation, as well as in education and licensing, must be narrow to the purpose of government and avoid consequential and predictable as well as express classifications or discriminations among people which are not clearly relevant and justifiable to government.

Thompson v. Shapiro (U.S.D.Ct. D. of Connecticut, June 19, 1967, Civil No. 11,821). A copy is in the CA 9 file in No. 22053, Marshall v. California Department of Social Welfare.)

Harper v. Virginia State Board of Elections (1966) 383 US 663

Carrington v. Rash (1965) 380 US 89 at 93 to top of 94, and 96

Griffin v. County School Board of Prince Edward County (1964) 377 US 218 at 227-228

Anderson v. Martin (1964) 375 US 399

Bolling v. Sharpe (1955) 347 US 497

McDonald v. Key (1955) 224 F2d 608, cert. denied 350 US 895.

The statutes abjured by plaintiff and acts and omissions of defendants pursuant thereto find analogy in cases where federal courts have stricken devices contrary to equality of citizenship and even-handedness of States with respect to the people. Here California legislators would statutorily forfeit participation in elective offices against persons who have not given at least lip-

service to their incumbencies by registering to a State party as electors and compel disclosure of names of supporters of their opposition as a condition of its access to the ballot! Consistently with the First, Ninth, Thirteenth, and Fourteenth Amendments, attributes of federal citizenship are not so easily done away with!

It is one thing for a political party, or church, to exact oath and conformity of persons who have chosen its umbrella. Ray v. Blair (1952) 343 US 214. It is quite another for a State to compel conformity to a party, or among specified parties, or harass the inhabitants of the State from following political ideas and associations not of its legislators' choosing.

Reitman v. Mulkey (1967) 387 US 369

Cox v. Louisiana (1965) 379 US 536 at 553-558

Elfbrandt v. Russell (1966) 384 US 11 at 18-19

DeGregory v. Attorney General of New Hampshire (1966) 383 US 825

Bates v. City of Little Rock (1960) 361 US 516

Talley v. California (1960) 362 US 60

NAACP v. Alabama (1958) 357 US 449

See Griswold v. Connecticut (1965) 381 US 479 at 485

See Kennedy v. Mendoza-Martinez (1963) 372 US 144

See Afroyim v. Rusk (1967) 387 US 253.

A State legislature may not vitiate the elected choice of the people by political test of the individual chosen.

Bond v. Floyd (1966) 385 US 116.

The reasoning applies equally whether the test is after the final election or, as here, before it in conditions of issue of nomination papers, for listing of names on ballots, and issuing certificates of nomination and election.

4. Three-Judge District Court

Federal court jurisdiction and substantiality of claims with reference to the United States Constitution in the action here will have clearly appeared ere now. The Complaint otherwise fulfills criteria for a three-judge District Court.

Marshall v. California Department of Social Welfare (CA 9, August 18, 1967 No. 22053; U.S.D.Ct. N.D. Calif. No. 47401)

Borden Co. v. Liddy (CA8 1962) 309 F2d 871 at 876-877

Jordan v. Silver (1965) 241 F Supp 576, (1965) 381 US 415

Baker v. Carr (1959) 175 F Supp 649, (1961) 369 US 186

United States v. Mississippi (1965) 380 US 128 at 130-131

Zemel v. Rusk (1965) 381 US 1 at 5-7

Anderson v. Martin (1964) 375 US 399

Idlewild Corporation v. Epstein (1962) 370 US 713

Hostetter v. Idlewild Corporation (1964) 377 US 324

Idlewild Corporation v. Rohan (S.D.N.Y. 1960) 188 F Supp 434

40 California State Bar J. (1965) 487 at 499

The Complaint should also be tested by cases illustrating exceptions to the general rule for a three-judge District Court. It stands sturdily, plaintiff submits, in merit for a three-judge District Court.

Moody v. Flowers (1967) 387 US 97

Pennsylvania P.U.C. v. Pennsylvania Railroad Co. (1965) 382 US 281

Turner v. City of Memphis (1962) 369 US 350

Bailey v. Patterson (1962) 369 US 31

Ex parte Poresky (1933) 290 US 30

See Kapral v. Jepson (1967) 271 F Supp 74.

Respectfully submitted,

Nancy Jewell Cross

Nancy Jewell Cross

TABLE OF REFERENCES

United States Supreme Court

CERTIFICATE OF RECOGNITION OF RULES

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Nancy Jewell Cross

Nancy Jewell Cross

AFFIDAVIT OF SERVICE OF COPIES

I, Nancy Jewell Cross, being first duly sworn, depose and say: that on Friday, November 10, 1967 I mailed three copies of my Opening Brief etc. in No. 22331 to each of the following:

Thomas C. Lynch, Attorney General
Charles A. Barrett, Assistant Attorney General
August J. Ginocchio, Deputy Attorney General
Fifth Street & Capitol Mall
Sacramento, California 94814

Keith C. Sorenson, District Attorney
John B. Segall, Deputy District Attorney
Hall of Justice and Records
Redwood City, California 94063

and deposited the two envelopes, sealed and with first class postage fully prepaid, addressed as snown above, in the United States mail at Palo Alto, California, and that there is regular pick up at the place of mailing and delivery at the places addressed by United States mail.

s/ NANCY JEWELL CROSS
Nancy Jewell Cross

Subscribed and sworn to before me,

tnis 10th day of November 1967,
at
Palo Alto

s/ ARTHUR W. ELLIS (SEAL)

Notary Public in and for the County
of Santa Clara, State of California.

(Stamp:)

Arthur W. Ellis
Notary Public - California
County of Santa Clara